

Case No:74881
Document No: 791247
Decision No: 102/16/COL

EFTA SURVEILLANCE
AUTHORITY

Ministry of Transport and Communications
PO Box 8010 Dep
0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning certain provisions governing access of transport operators to the market for taxi services and their compliance with Article 31(1) of the EEA

1 Introduction

By letter dated 6 March 2014 (Doc No 700930), the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Government that it had received a complaint concerning rules limiting access to the taxi services market in Oslo. The complainant alleges that the system currently in place in the Oslo municipality to regulate the access of new entrants to the taxi service market is in conflict with EEA law.

In this letter of formal notice, the Authority considers that the Norwegian national measures on access to the market for the provision of taxi services constitute a restriction on the freedom of establishment. The restriction is not justified.

2 Correspondence

In the letter dated 6 March 2014, the Authority invited the Norwegian Government to submit information regarding the application of existing rules on the award of licences to new entrants to the taxi services market.

The Norwegian Government replied by letter dated 9 April 2014 (Doc No 705245). In its reply, the Norwegian Government made reference to two letters (dated 12 March 2012, Doc No 627756, and 14 May 2012, Doc No 634780) that it had sent to the Authority in a previous complaint case (Case 69474), as it considered the relevant legal issues in the present complaint to be to a wide extent similar to those raised in the previous complaint.

The matter was further discussed during the package meeting which took place in Oslo on 16 October 2014.

By letter dated 8 July 2015 (Doc No 759724) the Authority’s Internal Market Affairs Directorate set out its preliminary view that the Norwegian national measures on access to

the taxi services market constitute a restriction on the freedom of establishment and that the restriction is not justified.

Norway replied by letter dated 30 September 2015 (Doc No 774703). The matter was further discussed at the package meeting in Oslo on 12 November 2015. Following the discussion, the Norwegian Government sent a further letter on 18 January 2016 (Doc No 789047).

3 The complaint

According to the complainant, Oslo municipality has rejected, on different occasions, his application for a licence to establish a new taxi service. The complainant argues that in general, the number of available taxi licences in a district is limited and that applications by new entrants for a new licence are treated on the basis of a “needs-based” analysis, whereby the competent authority restricts the total number of available taxi licences corresponding to demand in a given district. Furthermore, the complainant claims that the Norwegian rules in question require taxi drivers to be members of a taxi dispatch central and to pay a fee for this affiliation. In this regard, the complainant contends that there are no objective criteria for assessing whether in a given situation there is a need for new taxi licences. In addition, the complainant submits that Oslo municipality requires independent taxi businesses to become affiliated with so-called taxi centrals (“*drosjesentral*”) and to pay fees for this affiliation.

According to the complainant, the system in place limits the number of taxi licences and restricts new entrants, and, as a consequence, has led to disproportionately high prices for taxi services in Oslo. In the Oslo municipality, several taxi dispatch centrals have been established and all taxi service operators are obliged to be affiliated with one of them. Both existing licence holders and recipients of a new licence in Oslo are free to choose their affiliation among the approved taxi dispatch centrals, subject to the quantitative restriction that no dispatch central can have more than 50% of the total available licences.

4 Legal framework

4.1 EEA Law

No secondary EEA legislation exists laying down rules regarding the access to the market of providing taxi transport services.

Regulation (EU) No 1071/2009 *of the European Parliament and of the Council establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC*¹ regulates the admission to the occupation of road haulage operator and road passenger transport operators.²

As regards Regulation (EC) No 12/98 laying down the conditions under which non-resident carriers may operate national road passenger transport services within a Member State, it should be pointed out that the conditions for its application are not met in the present case, given that the regular transport services envisaged by the complainant do not constitute the national segment of a regular international service, for the purposes of Article 3(3) of that Regulation, and furthermore since they constitute urban or suburban

¹ OJ L 300, 12.11.2009, p. 51. Referred to at point 33b of Chapter II of Annex XIII to the EEA Agreement.

² Road passenger transport operators in this context are limited to operators of motor vehicles suitable for carrying more than nine persons, cf. Article 2(3) Regulation (EC) No 1071/2009.

services which are expressly excluded from the scope of the Regulation by means of Article 3(3) thereof.

Furthermore, as regards Directive 2006/123/EC on services in the internal market³, transport services, including urban transport and taxis, are expressly excluded from the scope of the Directive, pursuant to its Article 2(2)(d) and Recital (21).

4.2 Relevant national law

The complaint relates to the Norwegian national legislation on the access to the taxi services market in Oslo Municipality. The provisions in question are contained in the Norwegian Act on Professional Transport of 21 June 2002 no. 45 (“Professional Transport Act”)⁴ and Regulation 401/2003 (“the Professional Transport Regulation”)⁵.

The following rules and principles apply to new applicants seeking to obtain a professional transport licence:

- New operators of taxi services are required to obtain a taxi licence (Section 9(1) of the Professional Transport Act). In order to obtain the licence, applicants have to fulfil the requirements in Section 4(2) of the Act, which includes, *inter alia*, that they must be of good repute, have a satisfactory financial standing, and have sufficient professional competence.
- The number of taxi licences available in each licence district is limited and new licences are awarded subject to a needs test, which means that the competent authority in a licence district limits the number of taxi licences to a number corresponding to the (assumed) demand in the respective district.⁶ New licences are only granted if and when an existing licence becomes available (due to death or retirement), or when a new licence is issued by the authority.
- In order to determine the right level of supply for taxi services in a licence district, the competent authority in that district must regularly carry out an analysis of the taxi industry. Relevant factors to be taken into account in this analysis are the population in the licence district, statistics from the taxi industry with regard to earnings as well as changes in the demand for taxi services and the level of functioning of other forms of public transport services in the district.
- The criteria for the distribution and the grant of *existing* licences are listed in Sections 43 and 44 of the Professional Transport Regulation. The competent authority of each licence district decides upon the substantive conditions under which new licence(s) shall be granted/allocated.⁷
- Section 43(1)-(2) of the Professional Transport Regulation foresees that an applicant with at least two years’ experience as a full-time taxi driver within the licence district will be given priority to a licence which becomes available as a

³ OJ L 376, 27.12.2006, p. 36. Referred to at point 1 in Annex X to the EEA Agreement.

⁴ Lov 21. juni 2002 nr. 45 om yrkestransport med motorvogn og fartøy (*yrkestransportlova*).

⁵ Forskrift 26. mars 2003 nr. 401 om yrkestransport innenlands med motorvogn og fartøy (*yrkestransportforskriften*).

⁶ See the Norwegian Ministry of Transport and Communication’s information page on the arrangement: <http://www.regjeringen.no/nb/dep/sd/tema/yrkestransport/loyver.html?id=444316>

⁷ See the Norwegian Ministry of Transport and Communication’s information page on the arrangement: <http://www.regjeringen.no/nb/dep/sd/tema/yrkestransport/loyver.html?id=444316>

consequence of the death or ceased service of a previous licence holder, provided that the taxi driver was exercising the taxi driving as a main occupation. Section 43(3) of the Professional Transport Regulation furthermore stipulates that the applicant with the longest service as a full-time taxi driver within the licence district shall be awarded the available licence, if several applicants fulfil the conditions in Section 43(1)-(2). If a licence cannot be awarded on the basis of seniority, the decision is subject to the licensing authority's discretion, cf. Section 44 of the Professional Transport Regulation.

- Available licences shall be publicly announced, cf. Section 37(3) of the Professional Transport Regulation. In the announcement, the criteria for awarding the licence shall be set out. Furthermore, the Norwegian Government has referred to Circular N-14/81 paragraph 3, according to which the relevant criteria to be taken into account in this regard are the following: previous experience as a cab driver, gained seniority, connection with the taxi profession in general and geographical conditions. If the applicant claims that there are special circumstances which speak in his favour these shall be considered.
- Pursuant to Section 46 of the Professional Transport Regulation, the competent licensing authority can decide to establish one or more taxi dispatch centrals (*drosjesentraler*) within a licensing district, and to require licence holders to be affiliated with a dispatch central.
- According to the Norwegian Government, Section 1(1)(f) of the Professional Transport Regulation implies that operators are under an obligation to contribute to a 24-hours a day supply (see Section 46 of the Professional Transport Regulation) if the licence is connected to the licence holder's place of residence. If the licence is connected to a dispatch central, the licence holder is obliged to be available according to a shift plan of that central. In sparsely populated areas, licences are mostly connected to the licence holder's place of residence.

5 The Authority's assessment

The Authority takes the view that the applicable Norwegian national legislation on access to the market for the provision of taxi services, as described under Section 4.2 above, constitutes a restriction on the freedom of establishment under Article 31(1) EEA. In the Authority's view, the restriction is not justified.

5.1 Applicability of Article 31(1) EEA

In its letters to the Authority dated 12 March and 14 May 2012, the Norwegian Government has made reference to Article 48(1) of the EEA Agreement and argued that as a result of that provision, it is not necessary to assess whether the Norwegian rules in question here constitute restrictions on the freedom of establishment under Article 31(1) EEA.

Article 48(1) EEA reads: "*The provisions of an EC Member State or an EFTA State, relative to transport by rail, road and inland waterway and not covered by Annex XIII, shall not be made less favourable in their direct or indirect effect on carriers of other States as compared with carriers who are nationals of that State.*"

The Norwegian Government interprets this provision in such a way that national provisions regulating road transport in existence at the time of entry into force of the EEA Agreement and which have not later been changed in such a way as to make them less favourable to foreign operators, may continue to be in force. Furthermore, the Norwegian Government argues that the Norwegian rules in question here are based on objective and transparent, non-discriminatory criteria. Accordingly, and due to Article 48 EEA, the Norwegian Government argues that it is not necessary to consider whether the aforementioned rules constitute restrictions on the freedom of establishment under Article 31(1) EEA.

The Authority does not agree with the Norwegian Government's interpretation of Article 48(1) EEA. The corresponding rule in the TFEU, Article 92, provides for a national "standstill obligation" for Member States in the area of transport policy until the EU has passed measures foreseen under Article 91 TFEU. It prohibits Member States from applying existing national rules in the area of transport in such a way as to directly or indirectly discriminate against carriers from other Member States, unless a derogation is granted.

The CJEU has held with regard to Article 92(1) TFEU that the other basic rules of the Treaty are applicable insofar as they have not been excluded, and they can only be rendered inapplicable "as a result of an express provision in the Treaty".⁸ The only express provision in the EEA Agreement rendering inapplicable basic rules in this regard is Article 38 EEA which foresees a special exemption under which the freedom to provide services in the field of transport shall be governed by the provisions of Chapter 6 of the EEA Agreement.

Furthermore, in its judgment in Case C-195/90, the CJEU ruled with regard to the standstill obligation in Article 92(1) TFEU that "*the fact that a common transport policy has not yet been achieved does not empower the Member States to adopt national legislation, even limited in time, which is incompatible with the requirements of [Article 76] (now Article 92 TFEU) of the Treaty.*"⁹

The Authority holds that it follows from this case-law that also during the standstill period mentioned in Article 92(1) TFEU and Article 48(1) EEA, national legislation in the field of transport must be compatible with the general rules of the Treaty and the EEA Agreement.

Accordingly, it is the view of the Authority that Article 31 EEA is directly applicable in the field of transport, e.g. as regards national measures regulating access to the market for taxi services. Article 48(1) EEA does not provide that all national measures regulating road transport in force at the time of signature of the EEA Agreement can be maintained, regardless of their restrictive or discriminatory effect.

5.2 Restriction within the meaning of Article 31(1) EEA

As the ECJ and EFTA Court have consistently held, Article 31(1) EEA precludes any national measure which, even though it is applicable without discrimination on grounds of nationality, is liable to hinder or to render less attractive the exercise by EU citizens of the

⁸ Case C-167/73, ECLI:EU:C:1974:35, *Commission v France*, paras. 21-33; See also CJEU, Case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 23.

⁹ Case C-195/90, ECLI:EU:C:1992:219, *Commission v Germany*, para. 33.

freedom of establishment.¹⁰ The concept of ‘restriction’ for the purposes of Article 31(1) EEA covers measures taken by an EEA State which, although applicable without distinction, affect the access to the market for undertakings from other Member States and thereby hinder intra-EEA trade.¹¹ Article 31 EEA also prohibits discriminatory national measures which do not distinguish upon nationality as such, but *de facto* have (indirect) discriminatory effects.¹² Furthermore, it prohibits rules which impede or render less attractive the exercise of the freedom of establishment, in particular through the application of a prior authorisation procedure.¹³

National legislation which makes the establishment of an undertaking from another Member State conditional upon the issue of prior authorisation constitutes a restriction, since it is capable of hindering the exercise by that undertaking of its freedom of establishment, by deterring or even preventing it from freely pursuing its activities through a fixed place of business.¹⁴

5.2.1 The restrictive measures in question

The legislation in question requires private operators to obtain prior authorisation in order to operate a taxi transport service and therefore constitutes a restriction of the freedom of establishment. Such a restriction exists notwithstanding the fact that the legislation in question applies irrespective of the nationality of the persons concerned.¹⁵

For the sake of clarification, it should be stressed from the outset that the Authority does not in the present case challenge the requirement of a prior authorisation in itself.

However, the Authority is concerned with the restriction of the freedom of establishment that follows from the numerical limitation of available taxi licences. Under the applicable legal framework referred to under Section 4.2 above, a licence for the establishment of a new taxi business will only be granted under very specific conditions that are outside the sphere of influence of the provider seeking to obtain a licence. In the view of the Authority, these conditions do not satisfy the requirements set up by the European Courts for prior authorisation schemes, namely that they constitute objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily.¹⁶

Under the applicable rules, new applications for a taxi service operator's licence will be considered only if and when there is an available (free) licence, and priority will be given to local drivers in a district with at least two years' experience, taking into account criteria such as previous experience as a cab driver and gained seniority as a driver. Where these criteria do not apply and do not provide guidance, the competent authority shall decide, at its own discretion, which applicant should be awarded a free licence.

¹⁰ ECJ, Case C-400/08, ECLI:EU:C:2011:172, *Commission v Spain*, para. 64; Case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 45.

¹¹ ECJ, Case C-442/02, ECLI:EU:C:2004:586, *CaixaBank France*, para. 11; Case C-518/06, ECLI:EU:C:2009:270, *Commission v Italy*, para. 64.

¹² Case E-14/12 *ESA v Liechtenstein*, para. 28; Case E-8/04 *ESA v Liechtenstein*, para. 16.

¹³ Case C-265/12, ECLI:EU:C:2013:498, *Citroën Belux NV v Federatie voor Verzekerings- en Financiële Tussenpersonen (FvF)*, para. 35; Case C-205/99, ECLI:EU:C:2001:107, *Analir and Others*, para. 21; Case C-439/99, ECLI:EU:C:2002:14, *Commission v Italy*, para. 22.

¹⁴ Case Joined Cases C-171/07 and C-172/07, ECLI:EU:C:2009:316, *Doc Morris NV*, para. 23; Case C-169/07, ECLI:EU:C:2009:141, *Hartlauer*, paras. 34, 35 and 38

¹⁵ Case C-400/08, ECLI:EU:C:2011:172, *Commission v Spain*, para. 64; Case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 45.

¹⁶ Case C-390/99 ECLI:EU:C:2002:34, *Canal Satellite Digital v Administration General Del Estado*, para. 35 and Case C-205/99, ECLI:EU:C:2001:107, *Analir and Others*, para. 37.

In the view of the Authority, this system of allocating new licences effectively favours existing taxi licence holders (incumbents) and precludes new operators seeking to obtain a taxi licence from entering the market. Criteria such as seniority and previous experience as taxi drivers in the district appear to be, *prima facie*, discriminatory, as they clearly favour existing taxi operators in a district over new entrants without there being any discernible legitimate justification. The Authority further views as problematic the seemingly uncircumscribed residual discretion on the part of the competent authority, in cases where experience and seniority of the applicants for a licence do not permit to identify the candidate to whom the licence should be awarded. The Authority notes that in a case concerning the application by Spanish pharmacists for new licences, the CJEU held that national rules whereby licences for the establishment of new pharmacies are to be granted in accordance with an order of priority in which precedence is given to pharmacists who have pursued their professional activities within the province, are indirectly discriminatory¹⁷, as they, *de facto*, favour national pharmacists over those from another Member State. The same applies with regard to the Norwegian legislation on taxi licences in question. This legal framework has the potential to deter and prevent new operators from establishing a new taxi business and constitutes a restriction.

Furthermore, in those districts where there is an obligation upon taxi service providers to be connected to a taxi dispatch central, including the corresponding requirements that follow from this affiliation, this requirement constitutes an additional restriction of the freedom of establishment.

On this basis, the Authority is of the view that the Norwegian legislation in question governing the access of transport operators to the taxi services market, constitutes a restriction of the freedom of establishment. As a result of these provisions, the number of taxi services available in a district is limited and transport operators seeking to establish themselves in a district are impeded from doing so. The Norwegian licensing scheme impedes or renders less attractive the exercise of the freedom of establishment, cf. Article 31(1) EEA.

5.2.2 Justification

Restrictions on the freedom of establishment and the freedom to provide services are lawful only if they can be justified by overriding reasons in the public interest.¹⁸

It is settled law that restrictions on freedom of establishment which are applicable without discrimination on grounds of nationality cannot be justified unless the restriction (1) serves overriding reasons in the public interest, (2) is suitable for securing attainment of the objective pursued and (3) does not go beyond what is necessary for attaining that objective.¹⁹

In this regard, it should be recalled that it is for the national authorities to demonstrate that a restrictive measure is appropriate for securing the attainment of the objective relied upon and does not go beyond what is necessary to attain it. The reasons which may be invoked by a State in order to justify a restriction must thus be accompanied by an analysis of the

¹⁷ Joined Cases C-570/07 and C-571/07, ECLI:EU:C:2010:300, *José Manuel Blanco Perez and Maria del Pilar Chao Gomez*, paras. 122-125.

¹⁸ Case E-9/11, *ESA v Norway*, para. 83; Case E-15/11, *Arcade Drilling AS*, para. 82; Case E-3/06 *Ladbrokes*, para. 41; Case E-8/04, *ESA v Liechtenstein*, para. 23.

¹⁹ Case C-400/08, ECLI:EU:C:2011:172, *Commission v Spain*, para. 73; Case C-55/94, ECLI:EU:C:1995:411, *Gebhard*, para. 37; EFTA Court, Case E-3/05 *ESA v Norway*, para. 57.

appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments.²⁰

5.2.2.1 Overriding reasons in the public interest

(a) Arguments brought forward by the Norwegian Government

The Norwegian Government argues that the existing Norwegian rules on access to the taxi services, and in particular the needs-based licensing scheme, are necessary in order to ensure a satisfactory service justified by legitimate objectives in the public interest. The main purpose of the rules, according to the Norwegian Government, is to ensure a satisfactory supply of taxi services at all times. More precisely, in order to oblige operators to be available and contribute to the provision of taxi services 24 hours a day, it is necessary to award licences based on a needs-based test. The Norwegian Government claims that without the needs-based test, which is linked to the obligation to be available 24 hours a day (where a licence is connected to the place of residence rather than to a dispatch central), it would be likely that the taxi services in sparsely populated areas would be unsatisfactory and that they would disappear at certain times of the day.

Furthermore, the Norwegian Government has claimed that the limitation of taxi licences also seeks to meet the objective of providing a secure and foreseeable income for taxi service operators, as well as a steady recruitment to the profession. In its letter dated 18 January 2016, the Norwegian Government explained that these considerations are a necessary part of the obligation to offer services 24 hours a day and be affiliated with a dispatch central: in the view of the Norwegian Government, a secure and foreseeable income for taxi service operators as well as a steady recruitment to the profession are necessary to ensure the main objective of providing the public with a satisfactory supply of taxi services.

With regard to the restrictive measure conferring competence upon the competent authorities to oblige licence holders to attach to a dispatch central and pay a fee for it, the Norwegian Government claims that this is necessary to pursue public interest and security objectives. In this regard, the Norwegian Government submits that this obligation ensures that customers only have to dial one single telephone number when ordering a taxi and furthermore, that this system enables the centrals to track the location of a given taxi at a given time and thereby also serves a preventive effect, in that it deters taxi drivers from committing acts of abuse, theft or violence.

(b) The Authority's assessment

The Authority has assessed the arguments that the Norwegian Government has brought forward to demonstrate that the restrictions inherent in the contested legislation governing taxi services are justified by overriding requirements relating to the public interest.

As regards the measures limiting the number of taxi licences, thus limiting access to establishment as a taxi operator, the Authority recalls that grounds of purely economic nature cannot constitute an overriding reason in the public interest justifying a restriction on a fundamental freedom and may thus not serve as a justification in this regard.²¹

²⁰ Cf. EFTA Court, Case E-12/10 *ESA v Iceland*, para. 57; ECJ, Case C-8/02, ECLI:EU:C:2004:161, *Leichtle*, para. 45; Case C-73/08, ECLI:EU:C:2010:181, *Bressol and Others*, para. 71; Case C-110/05, ECLI:EU:C:2009:66, *Commission v Italy*, para. 66; Case C-400/08, ECLI:EU:C:2011:172, *Commission v. Spain* para. 75.

²¹ Case C-400/08, ECLI:EU:C:2011:172, *Commission v. Spain* para. 74; Case C-338/09, ECLI:EU:C:2010:814, *Yellow Cab Verkehrsbetrieb*, para. 51; Case C-254/98, ECLI:EU:C:2000:12, *TK-*

As regards the argument that the limitation of available taxi licences serves to pursue the achievement of a “right correspondence between supply and demand”, the Authority takes the view that this does not constitute an overriding reason in the public interest capable of justifying the restriction of the freedom of establishment. This is an objective that is undoubtedly purely economic in nature. The same applies to the argument that the numerical limitation that follows from the needs-based test shall serve to guarantee a secure and foreseeable income for taxi service operators as well as a steady recruitment to the profession. To ensure a sufficient profit for existing taxi licence holders and dispatch centrals does not serve a public interest, but rather aims at the economic interests of specific economic operators. Equally, the objective of guaranteeing a steady recruitment to the taxi driver profession solely aims at regulating the conditions for new employment and the continuity of a specific business, which in themselves are not requirements in the public interest.²²

In contrast, the Authority acknowledges the reasoning of the Norwegian Government that the limitation can be necessary to guarantee a satisfactory (with 24 hours daily availability) supply in rural areas where taxis are often an indispensable means of transport and thereby serve a public interest. This reasoning relates to safeguarding a necessary standard and availability of passenger transport services for the inhabitants of a district and is, as such, not purely economic in nature. Ensuring that taxis are permanently available serves the protection of consumers which in itself can constitute an overriding requirement justifying a restriction of the freedom of establishment.²³ Therefore, the Authority acknowledges that the objective of guaranteeing a satisfactory, permanent supply of taxi transport services in the interest of consumers can be accepted as a requirement in the public interest in principle capable of justifying the restriction that follows from the numerical limitation of licences.

In addition, as regards the requirement to be affiliated with a dispatch central, the Authority acknowledges that grounds of transport safety can be relied upon as a justification for a restriction. The Norwegian Government argues that the connection to the dispatch central enables the central to track the location of a given taxi at a given time and thereby also serves a preventive effect as it deters taxi drivers from committing acts of abuse, theft or violence. The Authority acknowledges that grounds of transport safety can in principle be relied upon as a justification for a restriction of the freedom of establishment.

5.2.2.2 Suitability

While the objectives of guaranteeing a satisfactory, permanent supply of taxi transport services in the interest of consumers and ensuring transport safety are capable of constituting overriding reasons in the public interest justifying a restriction, the Authority has doubts whether the national rules referred to above are suitable in order to attain these

Heimdienst, paras. 32-33; Case C-456/10, ECLI:EU:C:2012:241, *ANETT*, para. 53; Case C-109/04, ECLI:EU:C:2005:187, *Kranemann*, para. 34.

²² Case C-400/08, ECLI:EU:C:2011:172, *Commission v. Spain* paras. 95-98, in which the Court held, in the context of a decision to grant a licence for a new retail establishment, that to take account, for the purposes of granting such a licence, of the existence of retail facilities in the area concerned and the impact of a new establishment on the commercial structure of that area concerns the impact on existing traders and the market structure, and therefore does not relate to consumer protection.

²³ Case C-260/04, ECLI:EU:C:2007:508, *Commission v Italy*, para. 27; Case C-393/05, ECLI:EU:C:2007:722, *Commission v Austria*, para. 52; Case C-458/08, ECLI:EU:C:2010:692, *Commission v Portugal*, para. 89.

objectives. The Authority recalls in this regard that national legislation is appropriate for ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner.²⁴

The Authority considers that the numerical limitation of licences as well as the requirement to be affiliated with a taxi central (or the obligation to offer 24 hours a day taxi service where the licence is connected to the licence holder's place of residence, respectively) can be suitable for attaining the former objective that the Norwegian Government has invoked, as these requirements can in fact serve to ensure the existence of a satisfactory supply of taxi services, in certain sparsely populated areas where it is not commercially viable to offer round the clock taxi services.

However, the Authority takes the view that with regard to the numerical limitation of the available taxi licences, the Norwegian Government's reasoning does not hold, in particular when considering the provision of taxi services in densely populated licence districts where different means of transport are available at all times. In these areas, it is rather likely that limiting the number of available licences for each taxi district on the basis of a needs-based test will have the result of limiting supply, as new operators will be precluded from entering the market. Therefore, insofar as densely populated districts are concerned, the Authority takes the view that the Norwegian Government has not shown that the numerical limitation of licences is suitable to achieve the objective of guaranteeing a satisfactory, permanent supply of taxi transport services.

The Authority notes that its view appears to be in line with the conclusions drawn by the Norwegian Competition Authority (*Konkurransetilsynet*) in a recently published report on the Norwegian taxi market.²⁵ In that report, *Konkurransetilsynet* held that the needs-based licensing system constitutes the most significant entry barrier in the taxi market, and that it leads to an inefficient exploitation of resources and limits labour productivity.²⁶

It is the Authority's view that allowing new entrants to the market would, incidentally, also be likely to lead to a reduction of taxi fares, thereby benefitting customers by satisfying their need for affordable means of transport. There are evidently indicators showing that the current system of regulating access to the taxi services market have had adverse effects for customers, as taxi prices in Oslo have seen a rather steep increase in recent years²⁷, while at the same time the demand for taxis has decreased significantly. Such adverse effects point to the absence of a right balance of supply and demand.

Furthermore, the Norwegian Government has failed to demonstrate, in its submission, how exactly the "right balance" between supply (as part of the analysis underlying the needs test) and demand is established in the Oslo municipality and other large, densely

²⁴ Case C-169/07, ECLI:EU:C:2009:141, *Hartlauer*, para 55.

²⁵ Konkurransetilsynet, Rapport: Et drosjemarked for fremtiden, published on 20 March 2015 (www.konkurransetilsynet.no/globalassets/filer/publikasjoner/rapporter/rapport_drosjemarked-for-fremtiden.pdf).

²⁶ Ibid, page 33: "*Den vesentligste etableringsbarrieren er knyttet til det behovsbaserte løyvesystemet. Konkurransetilsynet er av den oppfatning at behovsprøvingen bør fjernes i hele landet. Behovsprøvingen begrenser tilbudet og ikke minst nødvendig fleksibilitet på tilbudssiden. Ut over behovsprøvingen er det særlig kravet om at drosjekjøring skal være hovedervert som fører til lite effektiv utnyttning av ressurser, og begrenser arbeidskraftproduktiviteten.*"

²⁷ Pursuant to a newspaper article published on 24 November 2014 (<http://www.nettavisen.no/na24/elleville-taxipriser---76-prosent-priskning-pa-7-ar/8512709.html>), the average taxi fare per kilometer has risen from 16.56 NOK to 29.15 NOK between 2007 and 2014, thus an increase of 76 per cent. These figures are based on data collected by Statistics Norway (*Statistisk sentralbyrå*, SSB).

populated municipalities in Norway. Therefore, the Authority concludes that the Norwegian Government has not demonstrated that restricting the number of available licences does in fact have the result of guaranteeing a satisfactory (with 24 hours daily availability) supply in the public interest.

Finally, as regards the objective of ensuring transport safety supposedly pursued by imposing the requirement to be affiliated with a dispatch central, it appears inconsistent that this affiliation requirement is not systematically imposed on all drivers in all districts. In some districts, dispatch centrals are established and the affiliation requirement exists, whereas in other districts, the licence is linked to the drivers' residence and no such requirement exists. As a consequence, the Authority concludes that the national legislation at issue does not pursue the stated objective of ensuring transport safety in a consistent and systematic manner and therefore cannot be considered appropriate for attaining the objective.

5.2.2.3 Necessity

In addition to being suitable, any restriction must not go beyond what is necessary in order to attain its overriding public interest objective.

In the Authority's view, the Norwegian Government has not put forward any arguments to support its view that the limitation of the number of licences is necessary in order to ensure a satisfactory supply of taxi services. For the following reasons, the Authority considers that the rules go beyond what is strictly necessary:

- Pursuant to the Norwegian rules in question, the needs-based test and the numerical limitation is applied in such a way that new applicants shall not be granted a new licence where the demand for taxi services in a district can be satisfied by the existing number of taxi operators. The Authority recalls in this context that the fact that a particular number of licences is considered on the basis of a specific assessment to be 'sufficient' for a particular territory cannot in any event of itself justify the obstacles to the freedom of establishment and the freedom to provide services brought about by that limitation.²⁸ In the view of the Authority, it is moreover highly unlikely that in such a situation, the entry of new operators to the market will immediately result in overcapacity and in a situation where the needs of customers will no longer be satisfied in the same way. Rather, it can reasonably be expected that there will be a margin within which new entrants to the taxi market can be admitted, despite the fact that the existing demand can be met by the existing number of operators. The argument that without a needs-based test and a numerical limitation there would be too many taxi operators which would in turn lead to taxi services of lower quality must be rejected, as the Norwegian Government has not presented any evidence to support this claim.
- A less restrictive rule than a needs-based test is possible and feasible. A limitation on numbers would only seem justifiable very exceptionally on the basis of clear evidence that the admission of new entrants would put the functioning of the local taxi services market in danger. Rejecting an application for a new licence should only ever be possible if, under the specific circumstances in the respective district, there are indications that allowing new entrants into the market would seriously

²⁸ Case C-338/04, EU:C:2007:133, *Placanica*, para 51.

threaten to destabilise the local taxi services market and lead to a generalised market failure.

- As has already been explained under Section 5.2.1 above, the criteria that are applied in Norway for the decision to award a new licence, i.e. to give priority to applicants that have been working the longest, and for a minimum at least two years within the licence district (seniority rule), are discriminatory. What is more, this seniority rule goes beyond what is necessary to achieve the pursued objectives. The rule is in itself very restrictive as it will, in most situations, make it practically impossible for new operators from outside a district to establish a new business in the district. During the package meeting in Oslo in October 2014, the Norwegian Government representatives expressed their view that this rule contributes to ensuring a steady recruitment to the professions of taxi driver and taxi operator, as it makes the professions more attractive, by giving an incentive for entering a business which may be perceived by some as not having the highest status. The Authority notes that there is no evidence to support the claim that recruitment to the taxi profession is improved by the seniority rule. Rather, it would seem that opening up the market for new entrants would allow for an increase of recruits to the profession. The seemingly uncircumscribed residual discretion on the part of the competent authority, in cases where experience and seniority of the applicants for a licence do not permit to identify the candidate to whom the licence should be awarded, also appears in conflict with the requirements of EEA law concerning the transparency and impartiality. The rules in question must be clear, precise and predictable as regards their effects and circumscribe the competent authority's discretion by reference to objective criteria.²⁹

Furthermore, the Authority considers that the obligation for operators to be connected to a taxi dispatch central and to comply with the corresponding requirements, such as being part of a shift plan, appears to go beyond what is necessary in order to achieve the legitimate objectives. The Norwegian Government's arguments in favour of the affiliation to a dispatch centre, such as being able to hold track of drivers and taxis in the interest of security, could be achieved in the same way with less restrictive measures, such as the requirement for taxi operators to make use of technological equipment like GPS-tracking or electronic means of identifying a taxi in connection with payment.

6 Conclusion

For these reasons, the Authority concludes that the Kingdom of Norway has failed to fulfil its obligations under Article 31(1) of the EEA Agreement by maintaining rules on access to the taxi services market which provide for a system of prior authorisation, in the form of a licence, for establishing new taxi businesses, which (1) contains a numerical limitation of licences (2) under conditions for granting new licences which are not objective, non-discriminatory and known in advance and (3) provide for an obligation for taxi licence holders to be affiliated to a dispatch central.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority invites the Norwegian Government to submit its observations on the content of this letter *within two months* following receipt thereof.

²⁹ Case C-72/10, EU:C:2012:80, *Costa and Cifone*, paras 72-74 and case law cited.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

For the EFTA Surveillance Authority

For Helga Jónsdóttir
College Member

This document has been electronically signed by Frank Buechel on 25/05/2016